Supreme Court, U.S.
FILED
APR 20 1982
ALEXANDER L. STEVAS
CLERK

No.80-2162

October Term 1981

IN THE

Supreme Court of the United States

RAMAH NAVAJO SCHOOL
BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,

Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee.

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REPLY BRIEF OF RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC.

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmberg & Gross
P.O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

Of Counsel:
Neal A. Jackson
April 1982

Blue Feather Press, Ltd. Santa Fe, New Mexico

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. NEW MEXICO HAS SERIOUSLY DISTORTED THE RECORD IN THIS CASE	1
II. NEW MEXICO MISUNDERSTANDS THE RULE IN *WILLIAMS V. LEE*, 358 U.S. 218 (1959)	5
III. NEW MEXICO'S UNDERSTANDING OF PREEMPTION LAW IS SIMILARLY FLAWED	8
A. *Preemption Occurs Whenever A Federal Interest Is Impeded By State Action*	8
B. *The Preemptive Force Of The Indian Self-Determination Act, As Well As The Indian Trader Statutes, Avoids The Uncertainty, If Any, Of The Infringement Test And Disposes Of This Case*	11
IV. THE LEGAL INCIDENCE TEST IS INAPPROPRIATE TO STATE-INDIAN TAX CONFLICTS AND SHOULD BE REJECTED BY THIS COURT	15
CONCLUSION	20
APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES	PAGE
Brown v. Board of Education, 347 U.S. 483 (1954)	6
Bryan v. Itasca County, 426 U.S. 373 (1976)	17
Carson v. Roane-Anderson Co., 342 U.S. 232 (1952)	18
Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980])	Passim
Fisher v. District Court, 424 U.S. 382 (1976)	6
Hines v. Davidowitz, 312 U.S. 52 (1941)	9, 11
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	15
Jones v. Rath Packing Co., 97 S. Ct. 1305 (1977)	9
Jose, Ben v. Gallup-McKinley County School Bd., No. 12,913, N.M. Dist. Ct. for McKinley County, (unreported)	4
Kennerly v. District Court of Montana, 400 U.S. 423 (1971)	10
Lau v. Nichols, 414 U.S. 563 (1974)	7
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)	5, 6, 14, 15, 16
Merrion v. Jicarilla Apache Tribe, 455 U.S. ____, 50 U.S.L.W. 4169 (Jan. 25, 1982)	14, 17
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	6, 8
Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cr. 1980), cert. den. 101 S. Ct. 1417 (1981)	14
Morton v. Mancari, 417 U.S. 535 (1974)	16
Natonabah v. Gallup-McKinley Cty. Sch. Bd., 355 F. Supp. 716 (D.N.M. 1973)	12
Navajo Nation v. United States, 668 F. 2d 1100 (9th Cir. 1982)	19
Northern Cheyenne Tribe v. Adsit, 668 F. 2d 1080 (9th Cir. 1982)	19
Orr. v. Orr, 440 U.S. 268 (1979)	14

San Antonio School Dist. v. Rodriguez,
411 U.S. 1 (1974) 4
San Carlos Apache Tribe v. Arizona, 668 F. 2d 1093
(9th Cir. 1982) 19
Santa Rosa Band v. Kings County, 532 F. 2d 655
(9th Cir. 1975), cert. den. 429 U.S. 1038 (1977) ... 10
Seminole Nation v. United States, 316 U.S. 286 (1942) 18
United States v. County of Allegheny,
322 U.S. 174 (1974) 3, 14
United States v. Kagama, 118 U.S. 375 (1886) 15
United States v. Mitchell, 100 S. Ct. 1349 (1980) 18
United States v. New Mexico, 455 U.S. ____,
U.S.L.W. _____ (March 24, 1982) 10, 15, 16, 17
United States v. Rickert, 188 U.S. 432 (1903) 18
Warren Trading Post Co. v. Arizona Tax Comm'n,
380 U.S. 685 (1965) 19
Warren Trading Post Co. v. Moore, 95 Ariz. 110,
387 P. 2d 809 (Ariz. 1963) 19
White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) ..... Passim
Williams v. Lee, 358 U.S. 217 (1959) ..... Passim
Worcester v. Georgia, 6 Pet. 515 (1832) 8

UNITED STATES CONSTITUTION

Article I, sec. 8. cl. 3 19

TREATIES AND STATUES

Indian Self-Determination Act. Pub. L. 93-638,
25 U.S.C. 450 *et. seq.*, 88 Stat. 2203 ..... Passim
Ramah Navajo School Design and Construction
Appropriation Acts, Public Laws 92-369,
86 Stat. 510; 93-120, 87 Stat. 431; 93-245,
87 Stat. 1073; 93-404, 88 Stat. 810; 94-165,
89 Stat. 985; 95-74, 91 Stat. 293 ..... 1, 10, 19

25 U.S.C. 450b(c) 4
25 U.S.C. 450f 3
25 U.S.C. 452 10
25 U.S.C. 231 ..... 10, 12
25 U.S.C. 261 *et. seq.* 13, 19
32 U.S.C. 101 *et. seq.* 10
New Mexico Enabling Act. 36 Stat. 558-559, sec. 2(B); N.M. Const., Art. XXI, sec. 2 19
Navajo Treaty of 1868, Art. VI, 15 Stat. 667, 669 10, 19
Public Law 93-245 10
Public Law 95-74 7
Navajo Tribal Code, Title 10, secs. 51 *et. seq.* 3, 8
New Mexico Gross Receipts and Compensating Tax Act, sections 7-9-1 *et. seq.*, N.M.S.A., 1978 ... Passim
7-9-55 2
7-9-57 2
Public Law 95-561, Title XI, Sec. 1101(c) and (d) 12
25 U.S.C. 465 18
25 U.S.C. 478b 18
25 U.S.C. 398 18
25 U.S.C. 398c 18
25 U.S.C. 399 18
§22-5-4 N.M.S.A., 1978 4

HEARINGS BEFORE SENATE AND HOUSE COMMITTEES REGARDING DEPARTMENT OF THE INTERIOR APPROPRIATIONS BILLS

Senate Hearings Before the Committee on Appropriations, Dept. of the Interior and Related Agencies Appropriations, 93rd Cong., 1st Sess., Part 4 (1973) 10
Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives,

94th Cong., 1st Sess., Part 7 (1975) 11
Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2d Sess., Part 7 (1976) 4, 5
Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 95th Cong., 1st Sess., Part 9 (1977) 4, 5
Senate Hearings Before the Committee on Appropriations, Dept. of the Interior and Related Agencies Appropriations, 95th Cong., 1st Sess., Part 5 (1977) 4
Hearings Before a Subcommittee on Appropriations, House of Representatives, 95th Cong., 2d Sess., Part 9 (1978) 11
Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 96th Cong., 1st Sess., Part 6 (1979) 5

TREATISES AND OTHER AUTHORITIES

G. Gunther, *Constitutional Law* (9th ed. 1975) 9
L. Tribe, *American Constitutional Law* (1978) .. 8, 9, 17
Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands, 64 Iowa L. Rev. 1479 (1979) 9
United States Department of the Interior, Budget Justifications to Congress:
FY 1978 ..... 3, 7
FY 1981 11
25 CFR 271.2 (q) 13
25 CFR 271.11 3

I
NEW MEXICO HAS SERIOUSLY DISTORTED THE RECORD IN THIS CASE.

New Mexico's argument largely turns on two broad factual premises neither of which finds any support in the record or in the legislative history of the appropriations Acts involved.

First the State would have this Court believe that Congress authorized payment of this tax because, it says, Ramah's architects must have included the tax in the construction cost estimates given to Congress. It bases this inference upon the belief that the architects paid "$24,000 in New Mexico gross receipts taxes on their services for the Board," Ans. Br. 4 n. 4. However, All claims based on architects' payments were dismissed and no proofs were offered on the subject by either side. And so the trial court found, JS 49, no. 22, when it said: "(T)he architects . . . are not parties to the suit and have not exhausted their administrative remedies and there are no specific financial figures attributable to the gross receipts (sic, i.e., taxes) paid by them." (This finding was never challenged by the State and in fact had been solicited by it, Tr. Rec. 493.) Indeed, there is no evidence that the architects paid any gross receipts tax to New Mexico much less that they passed on the tax to the Board as Lembke did. Nor does the word tax appear in the legislative history of the Appropriations Acts, see Ans. Br. ix and x.

But, says the State, the architects must have known about the tax and included it in their estimates implicitly because they required bidders to include the tax in their bids and then required Lembke, the low bidder (on phase I), to pay the tax. Ans. Br. 4, 22. Again, neither assertion is correct. The bid solicitation said:

> All contractors . . . shall comply with provisions of New Mexico Sales and Use Tax Law and all amendments . . . and require all of their subcontractors to do likewise.

Ex. D-3, by Stipulation, 36-38, Ex. Vols. 99-111. Nowhere does this language direct bidders to include the New Mexico gross receipts tax as a part of their bids on the Ramah project. The language is clear and requires no parol evidence to interpret. It means that when a bidder is successful in negotiating a contract for the job, he will be required to comply with applicable tax laws, a perfectly understandable condition designed to protect owners and their projects from liabilities and disruption which may be caused if a contractor neglects to pay required taxes. Lembke would have been in complete accord with this provision had it noted in its bid that under Federal law its receipts from this project were immune from State gross receipts tax and thereafter so indicated on its monthly self assessment tax forms by taking a deduction for its receipts from the Ramah project.[1]

Similarly, the contracts between the Board and Lembke do nothing more than require Lembke to pay only those taxes which are applicable. Section 4.6.1, standard A.I.A. language, in each of Lembke's contracts says:

> The contractor shall pay all sales, consumer, use and other similar taxes *required by law.* (emphasis added)

P-32 through P-36, by stipulation at 36-38, Tr. Pr. 119, 155, 169, 182, 221. In express terms this language absolves Lembke from paying any taxes which are not required by law — federal law in this case. In any case, such language has previously been held not to constitute a

---

1. See, §§7-9-55 and 7-9-57, N.M.S.A., 1978.

waiver of sovereign tax immunity. *United States v. County of Allegheny,* 322 U.S. 174, at 189 (1944).

In short there is no basis for concluding that "the Board knew from the 'outset' that construction costs included gross receipts taxes" or that the "construction figures its executive director presented to Congress year after year obviously included gross receipts tax". Ans. Br. 21. In any event, these estimates, were lump sum figures not broken down by component costs, so that even if the taxes had been included in them (which is not the case) Congress could have had no inkling of this. [2] Moreover, both the trial court (Finding 16, JS 47) and the Court of Appeals (JS 29) found and held that the School Board (not Congress) "sustained the financial burden of the tax".

Second, the State contends that the Board is not a true agency of Navajo tribal government. However, the record speaks decisively and conclusively to the contrary. The point is established by the resolution of the Ramah Navajo Chapter, a political subdivision of the Navajo Tribe, which authorized the formation of the Board pursuant to the Navajo Tribe's Education Code, Title 10, Secs. 51 *et. seq.*, P-46, JA 128; Tr. Pr. 192; and P-1(a), JA 114, by stipulation 36-38 and 81, 83. It is further bolstered by the requirement in both Public Law 93-638, 25 U.S.C. 450f, and its implementing regulations, 25 C.F.R. 271.11, that before the BIA may contract with a tribal organization such as the Board it must first be requested to do so by the tribe.

---

2. Typical is the 1973 testimony alluded to by the State, at 21 n. 33, which simply says: "We have been using architectural consultants and they have given us a total of $7.72 million to complete phase I of our construction plans."

The Navajo Tribe has consistently made such requests throughout the Board's existence. P-6 through P-11, by stipulation 36-38, 78, 80, 81, 83, JA 10-11. Moreover, the Navajo Tribe's statutory scheme, Exhibit P-1(a), *supra,* requires the School Board to conform to certain procedures for electing board members, conducting business, and conforming to broad tribal education standards. The Board is thus a public agency of the Navajo Tribe as that term is understood by the Navajo Tribal Council. Therefore, quite apart from the dispositive fact that federal law defines the Board as a tribal organization for purposes of carrying out self-determination policies, 25 U.S.C. 450b(c), its role in the Navajo governmental system is that of a local public school board for the Ramah Navajo Chapter, entirely analogous to State public school districts, which also operate autonomously. See, e.g., 22-5-4 N.M.S.A., 1978; Cf. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1 (1974). [3]

---

3. Contrary to New Mexico's contentions on these additional points:

A. Congress had been apprised of the construction of the Ramah Health clinic. Hearings Before A Subcommittee on Appropriations House of Representatives, 94th Cong., Second Sess., Part 7, at 496; Hearings, *supra,* 95th Cong., First Sess., Part 9, at 601 and 628; Senate Hearings Before the Committee on Appropriations, Dept. of the Interior and Related Agencies Apps. FY 1978, 95th Cong., First Sess., Part 5, at 2208.

B. New Mexico's claim that the Gallup-McKinley County School District . . . did provide bus service *for high schoolers* to nearby Zuni High School, (emphasis added), Ans. Br. 9, is grossly misleading: bus routes provided by the District after the State closed the Ramah School could reach only a tiny fraction of Ramah students. Tr. 178, 193-194; Ex. P-43; Tr. 181, 184, JA 124; Ex. D-C, Tr. 186, JA 133, JA 35. The State district court in *Ben Jose v. Gallup-McKinley Cty. Sch. Dist.,* No. 12,913, P-43, JA 124-127, Tr. Pr. 181, 184, found that extension of school bus routes into the Ramah Navajo area in Valen-

II

NEW MEXICO MISUNDERSTANDS THE RULE IN *WILLIAMS V. LEE*, 348 U.S. 218 (1959).

Under the State's view the infringement test in *Williams* applies only when State action directly impedes the activities of an Indian tribe's central governing body and then only when the governing body's activities are funded from tribal revenues.

This perception is of course contrary to the Court's view in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S.

---

cia County, where the majority of Ramah students lived (Tr. Pr. 49 and 50), was feasible. It then ordered the District to take steps to ensure that routes would be so extended in order to enable Ramah Navajos to attend Zuni high school following the closure of Ramah high school in 1968. This was not done. It is also established after more than ten years of operation of school bus routes in the area by the Ramah Navajo School Board that such transportation can be consistently maintained.

C. Per capita education costs at Pine Hill did not amount to "$10,000 per year". Ans. Br. 18, n. 26. The State's assertion does not fully take into account that the Board was simultaneously operating a health clinic, social welfare programs, job training programs, a radio station, adult education program, and dormitory. Tr. Pr. 57, 243-244. The testimony was to the effect that the Board had effectively replaced the BIA itself and was operating "as a local government for that community." Tr. Pr. 57, and see House Subcom. Hearings, 96th Cong., First Sess., Part 6, at 387 and 393.

D. The Board did apprise Congress of the need for more classrooms after phase I was built. See, House Hearings, FY 1977, 94th Cong., Second Sess., Part 7, at 495, 496; House Hearings, 95th Cong., First Sess., Part 9, at 612, 613; House Hearings, 96th Cong., First Sess., Part 6, at 395.

E. The cafeteria had originally been planned in phase I. However, the bids came in considerably higher than estimated, so the self-contained cafeteria was reserved for a later phase and a makeshift cafeteria was juryrigged in space which had been intended for vocational education. House Hearings, 95th Cong., First Sess., Part 9, at 628.

164, 179 (1973): "In fact, we are far from convinced that when a State imposes taxes on reservation members without their consent, its action can be reconciled with tribal self-determination."

As demonstrated, *infra,* pages 3 and 4, the Board operates as an agency of Navajo tribal government. But even if this were not true, the nature of the function which the State has hampered — education — is so vital to tribal self-government and "essential tribal relations", *Williams,* at 219, that were the Board a private school regulated by Navajo tribal law, the tax in question could not be imposed. This is so because the tax constitutes an extra and unauthorized burden on the educational process at Ramah. It contributes to overcrowding and similar physical and instructional problems in this Navajo school on the Navajo Reservation. The tax thus interferes with a conceded governmental priority of both the Navajo Tribe and the United States to produce educated Navajo citizens, a need which this Court has long recognized as essential in a democratic society. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

Because the rule in *Williams,* as noted in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157, n. 13 (1973) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 164, n. 3 (1980), does not turn on the tribal means used to accomplish a tribal governmental goal, any State action which significantly impairs the ability of Navajos to govern themselves on the Navajo Reservation must fall.

The State also argues that since the monies used to construct these facilities came from the Federal government, there was no impact on Navajo self-government and the infringement test does not apply. On the contrary, this Court in both *Williams v. Lee* and *Fisher v. District Court,*

424 U.S. 382 (1976), protected the sovereign prerogatives of tribal courts from State incursions, even though the cost of tribal court systems and indeed much of the cost of tribal governments around the country is borne by the Federal Government.[4]

In brief, if the source of tribal funds for financing tribal government were determinative, then much of the protections against State interference with tribal governmental functions long recognized by this Court would vanish. Tribal governmental functions do not become any the less tribal or governmental because they are funded by the Federal government. Indeed the fact that States receive Federal funds to support the exercise of State powers has never been held to deprive such powers of their state or governmental character. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974).

The State would confine the *Williams* rule to activities of the central tribal governing body itself. For a tribe the size of the Navajos, such a limitation would vitiate the protections afforded by the rule. As is the case with States and the Federal government, the Navajo Tribe cannot carry out every function of government through its central

---

4. In FY 1978 the BIA requested and received approximately $19,498,000 for Aid to Tribal Government. A major portion of these funds went to pay the costs of tribal courts. The BIA justified its request in part by saying: "One of the principal missions of the Bureau is to assist tribal governments in developing their capabilities to fully exercise their rights of self-government and self-determination and to effectively deliver or direct the delivery of services needed by Indian communities and the individuals and families residing therein." United States Dept. of the Interior, Budget Justifications, FY 1978, at IA-17 and IA-18; Pub. L. 95-74, 89 Stat. 985.

legislature, the tribal council.[5] It must delegate authority to local units of government, as it has done in Title 10 of its Tribal Code, Ex. P-1(a), *supra*.

The State objects to the *Williams'* formulation because it requires a measure of judgment. If certainty, however, is to be the sole objective, then, instead of gutting Indian treaty and statutory rights by giving States entire control of a labeling process upon which the applicability of a State tax affecting Indians would be based, the State's desire for certainty could as easily be fulfilled by returning to the flat rule of *Worcester v. Georgia*, 6 Pet. 515 (1832), barring exercise of any State jurisdiction on Indian reservations.

III

NEW MEXICO'S UNDERSTANDING OF PREEMPTION LAW IS SIMILARLY FLAWED.

A. Preemption Occurs Whenever A Federal Interest Is Impeded By State Action.

New Mexico fails to recognize that preemption occurs whenever a State takes action which significantly threatens the fulfillment of any valid Federal objective, program, policy, or plan. There is no requirement, as the State would suggest, Ans. Br. 20, that there be a "pervasive scheme of regulation" before preemption takes place. As Professor Tribe comments:

> The question whether federal law "preempts" state action, largely one of statutory construction, cannot be reduced to general formulas. In evaluating patterns

---

5. Cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, N. 13 (1973) (". . . the question of [tribal] tax immunity cannot be made to turn on the particular form in which the tribe chooses to do its business.")

> of statutory interaction, the Supreme Court has declared generally that whether challenged state action has been pre-empted turns on whether or not it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Professor Tribe goes on to state:

> But state and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie the federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. See, e.g., *Jones v. Rath Packing Co.,* 97 S. Ct. 1305 (1977).

L. Tribe, *American Constitutional Law,* at 377, 378, 379 (1978). See also, G. Gunther, *Constitutional Law,* at 257 (9th ed. 1975), and Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands, 64 Iowa L. Rev. 1479 (1979).

For this reason the presence or absence of a comprehensive regulatory scheme either for Indian education generally or for Indian school construction is not dispositive.[6]

---

6. Although not indispensable for a ruling in favor of the Board, there are comprehensive congressional schemes covering Indian education on reservations in general, on-reservation school construction and self-determination contracting, each of which has been impinged by New Mexico's tax, see *infra,* pages 11-14. Simply because States have been delegated a role in on-reservation Indian education does not

The necessary question is whether the State's tax has significantly impeded congressional objectives expressly stated in the Navajo Treaty, The Indian Self-Determination Act, and the purposeful appropriations made by Congress to this School Board for the construction of school and related facilities. (see JA 39, 40; and Pub. L. 93-245, 87 Stat. 1073, JS 11 and, Senate Hearings, Comm. on Appropriations, Dept. of the Interior, H.R. 8917, FY 1974, 93rd Cong., 1st Sess., page 3617).

In this case the fact that the New Mexico gross receipts tax has substantially impeded fulfillment of congressional objectives is evident from the State's stipulation and trial court's finding that the Board sustained the entire burden of this tax, $232,368.38 by the date of trial. JA 34, JS 51, 52.[7]

Whether this sum corresponds to the loss of an identifiable structure or component of the school construction project is immaterial. The school remains uncompleted. Classrooms had been planned for space which had to be converted into a makeshift cafeteria. House Hearings,

---

diminish the pervasiveness of these schemes. Comprehensiveness does not turn on exclusivity. National defense is no less a Federal prerogative just because States operate National Guards, 32 U.S.C. secs. 101 *et. seq.* See, *Santa Rosa Band v. Kings County,* 532 F. 2d 655 (9th Cir. 1975), cert. den. 429 U.S. 1038 (1977), holding county zoning ordinances preempted from enforcement within reservation boundaries, even though housing and sanitation programs for Indians are not exclusively Federal functions, see 25 U.S.C. 231 and 452. Cf. *Kennerly v. District Court,* 400 U.S. 423 (1971).

---

7. The State admits that its gross receipts tax operates as a sales tax. See Appendix A, excerpt from Taxation and Revenue Dept, brochure explaining the tax. And see *United States v. New Mexico,* _____ U.S. _____, _____ U.S.L.W. _____ (March 24, 1982), Slip Op. 1.

94th Cong., 1st Sess., Part 7, page 276. Landscaping has not been completed, so there is a perennial problem with mud. See, House Hearings for FY 1980, 95th Cong., Second Sess., part 9, page 168. Certainly inflation also helped deplete the value of the resources available to the Board, but the tax itself is unquestionably substantial and depleted the resources needed for construction. Its recovery will advance the completion of the school and help Congress meet its treaty obligation to the Navajos as well as its commitments under The Indian Self-Determination Act. For these reasons, the tax has plainly impeded "the full purposes and objectives of Congress." *Hines, supra* at 67.

B. The Preemptive Force Of The Indian Self-Determination Act, As Well As The Indian Trader Statutes, Avoids The Uncertainty, If Any, Of The Infringement Test And Disposes of This Case.

A Federal statute makes clear that the tribal government function involved here has drawn special attention from Congress and therefore is protected by Federal law. In the Indian Self-Determination Act, Congress has created a discrete program for improvement of Indian education under which tribes and tribal organizations may take over the management of their own governmental affairs without losing the benefits of Federal protection and funding.[8] Moreover, Congress has taken special pains to allow

---

8. In recognition of the extra costs incurred when tribes operate Federal programs, Congress has appropriated annual funds for contract support whose purpose "is to pay tribes for the overhead costs they incur as a result of entering into P.L. 93-638 contracts." United States Dept. of the Interior, Budget Justifications, FY 1981, at BIA-59. The Board did not, however, receive contract support funds

the Ramah Navajo Community to construct its own school facilities so that its children could come home from boarding schools and attend a local community-run school. The Congressional interests thus manifested necessarily oust New Mexico from any activity which burdens this tribal effort to assume control of Federal programs under the Act.[9]

By focusing on the Indian Self-Determination Act much of the presumed uncertainty of the two existing tests (infr-

---

in addition to its construction appropriations for administration of this project. It thus bore overhead costs directly from those appropriations, further exacerbating the burdern of the tax in question here.

---

9. In arguing that the Federal government has not occupied the field of Indian education, the State makes much of the fact that two-thirds of Indian children in school attend public schools. However, the Federal government pays a large portion of the cost of educating Indian children in public schools both on and off reservations, see *Natonabah v. Gallup-McKinley County School District*, 355 E. Supp. 716 (D.N.M. 1973). But most critically, Federal policy to send Indian children to public schools has changed. Section 1101(d) of Title XI of Pub. L. 95-561, enacted in 1978, now permits tribes to withdraw their children from unresponsive public school districts and compel the BIA to provide schooling in place of the public schools either in a tribal contract school operated under Title I of The Indian Self-Determination Act or in a BIA-operated school. Note also, Section 1101(c) of the Act:

> This paragraph is based upon the special relationship between the Indian nations and the United States and nothing in it shall be deemed to relieve any State of any duty with respect to any citizens of that State.

In any case, when States operate schools within reservations the interplay of tribal as well as State and Federal sovereignties comes into play, creating different roles, responsibilities and privileges. See 25 U.S.C. 231, requiring tribal consent for exercise of State compulsory school attendance laws within reservations.

ingement and preemption) vanishes. Congress itself has fused the two tests, providing "objective criteria" for determining when State action is barred because it impinges upon tribal government,[10] at least when a tribe or tribal organization makes use of the Act's provisions by contracting, as here, for services previously under Federal control.[11]

Thus, the Court may dispose of the case simply by holding that whenever a State significantly impedes a "tribal governmental function" contracted or contractable under the Indian Self-Determination Act, the Act itself determines whether the *Williams* infringement test has been breached, a formulation as precise as any that exists in preemption law.

Alternatively, of course, in addition to the Indian Self-Determination Act, the Indian Trader Statutes, 25 U.S.C. 261 *et. seq.*, serve as a parallel basis for finding the State's tax preempted in this case.[12] However, if the Court

---

10. For example, the implementing regulations of the Interior Department contain a detailed definition of "tribal governmental function", 25 CFR 271.2(q).

---

11. Lembke is subject to the regulations under Pub. L. 93-638. See Appellants' Brief in Chief 28-31. Because these regulations cover only the activities of subcontractors, not employees, of '638' tribal contractors, there is, moreover, no danger that a ruling in favor of the Board here will prevent States from taxing the incomes of non-Indian employees of tribal organizations. Income taxes are not normally passed on the way that sales taxes are. So there is no reason to conclude that income taxes on non-Indians employed by Indians on reservations would violate either the infringement test, the preemption test, or the fused test discussed here.

---

12. New Mexico's contention that the Court lacks jurisdiction over this issue is without merit. New Mexico failed to raise any jurisdic-

wishes, it may also return to a more absolute formulation based either on the Indian Commerce Clause or on an extension of the rule in *McClanahan v. Arizona State Comm'n,* 411 U.S. 164 (1973), Appellants' Brief in Chief 34-39.[13] Any of these approaches results in a decision for the Board.

---

tional issue in its Motion to Dismiss or Affirm. The Jurisdictional Statement, however, expressly raised the trader statutes question. It follows that New Mexico invited a decision by this Court on the merits of this question. In any case, if the highest State court has dealt with and decided the validity of a State statute as against a claim that it violates Federal law, the Court will not look any further to see how the issue was raised. *Orr v. Orr,* 440 U.S. 268 (1979). In this case, the New Mexico Court of Appeals held that "the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax", citing *Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967 (10th Cir. 1980), cert. den. 101 S. Ct. 1417 (1981), a case which involved the applicability of the trader statutes to on-reservation construction activities of a non-Indian under contract to a tribal agency. On rehearing the same court held: "Our case does not involve a comprehensive or pervasive scheme of federal regulation of the construction of a school nor does it involve federal regulation similar to the Indian trader statutes." JS 30, 36. In short, the highest State court reviewing the merits dealt with the issue and decided that the State tax statute was valid in spite of Federal laws including the trader statutes. The rule in *Orr* therefore applies. And see, *United States v. County of Allegheny,* 322 U.S. 174, at 192 (1944).

---

13. The United States has proposed reinstitution of an absolute rule in cases of this type resting on the Indian Commerce Clause. The recent decision in *Merrion v. Jicarilla Apache Tribe,* Nos. 80-11 and 80-15, _____ U.S. _____, Slip Opinion 22, (Jan. 25 1982) lends some support to the United States' proposal. The Court commented: "To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference, and has not relied on the Clause to authorize tribal regulation of commerce without any constitutional restraints." The passage seems to show a

IV

THE LEGAL INCIDENCE TEST IS INAPPROPRIATE TO STATE-INDIAN TAX CONFLICTS AND SHOULD BE REJECTED BY THIS COURT.

The States suggest that if the BIA had built this school itself by hiring its own contractor instead of contracting with the Ramah Navajo School Board, the Federal government would have had to absorb the tax burden[14] and that it makes no sense to apply a different rule just because an Indian organization enters the picture.

However, even if the proposition about the BIA's constructing the school were true, that fact alone would not justify imposing the burden on this Indian school board. The purposes of the contract with the Board differ

---

receptivity to reviving the presumptive force of the Indian Commerce Clause to bar any State activity on a reservation without prior approval of Congress which significantly affects tribal commercial dealings. We agree that such a presumption would produce a workable framework for resolution of disputes of this kind. And we would point out that this argument is functionally equivalent to the Appellants' argument for extension of the *McClanahan* rule to bar State taxes which directly and unavoidably infringe upon the sovereign functions of an Indian tribe. Brief in Chief 34-39.

---

14. We of course make no such concession. In fulfilling its special duties to Indians, *U.S. v. Kagama*, 118 U.S. 375 (1886), the BIA is not performing a service directly benefiting the United States as such, but Indian people. For the reasons outlined in this argument the construction of a school for Indian children under a treaty commitment may well absolve the BIA from the tax burden and hence invalidate the tax. For in that case, the tax would conflict with "the performance of a duty" by the Government and would be "a direct interference with the functions of government itself". *James v. Dravo Contracting Co.*, 302 U.S. 134, 157 (1937), as quoted in *United States v. New Mexico*, No. 80-702, Slip Opinion 14 (March 24, 1982).

substantially from those involved either when the government constructs its own facilities by hiring private contractors or when it contracts out the management of a non-Indian government program, as in *United States v. New Mexico, supra.* In neither situation, unlike the present case, is the government's purpose to assist the contractor itself; here its purpose is exclusively to achieve a benefit for Indians by promoting Indian control of governmental programs. Cf. *Morton v. Mancari,* 417 U.S. 535 (1974). Because of this difference, the legal incidence test would be inappropriate to resolution of disputes involving States and Indians, as this Court noted in *Central Machinery,* 448 U.S., at 164, n. 3, when it rejected an Arizona argument that its tax legally fell on a non-Indian.

Nevertheless, the States argue that replacement of the infringement on sovereignty test with the legal incidence test "would go a long way toward clarifying when and how Tribal sovereignty has been infringed". Ans. Br. 15. New Mexico even suggests that the legal incidence rule would "end the anomoly of Indian tribes being more sovereign vis-a-vis the states than the United States itself." *Ibid.*

The major problem with these contentions is their failure to understand the unique relationship between Indian tribes and the United States. As this Court noted in *McClanahan,* 411 U.S., at 172:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.

And see dissent in *Merrion, supra,* Slip Op. at 1.

The issue, therefore, is not whether Indian tribes are to be more sovereign than the United States but how to ensure that the different obligations and interests of the United States regarding Indian tribes (as contrasted within the States) are to be fulfilled. See *Bryan v. Itasca County,* 426 U.S. 373, at 376, n. 2 (1976).

Legal incidence as a test to decide when State tax burdens may be laid upon the United States accommodates the interests of Federal - State comity. So long as Congress retains the power to alter the test by imposing immunity against state taxes on government contractors' receipts, then the democratic interests unique to our federal system are well served. Once again Professor Tribe comments:

> As in eleventh amendment analysis, the issue is essentially one of reconciling competing claims of the states and the national government. Congress, because it represents both state and national interests, is again the most suitable body to make this determination.

L. Tribe, *supra,* at 400. And as this Court said in its unanimous decision in *United States v. New Mexico,* Slip Opinion at 14:

> At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority.

But Indian tribes as such are not represented in Congress. Instead they must rely on a course of dealing with the central government founded on treaties, statutes, and executive treatment. Principles such as legal incidence — which simply establishes a presumption permitting indirect tax burdens to be placed on the United States unless

Congress affirmatively prohibits such burdens[15] — can not be used when the United States by force of treaty, statute, or moral commitment must protect interests beyond its traditional functions vis-a-vis the States in our federation.

For in the Indian context the United States ceases to play the role of partner with States and assumes that of champion for Indians. The United States is under a duty to protect tribal interests. Cf. *Seminole Nation v. United States,* 316 U.S. 286 (1942). For this reason this Court has long held in Indian cases that the usual presumptions applying to Federal-State conflicts do not and should not apply unless Congress specifically so directs.[16] *White Mountain,* 448 U.S., at 143.

Adopting the legal incidence test to resolve disputes of the kind presented here would reverse a century or more of precedents protecting Indian tribes from unauthorized State incursions; and to do so by "refining" the *Williams* test as suggested by the States, would accomplish this reversal *sub silentio.* It would give State foxes the keys to Indian chicken coops by giving States the power by label alone to determine which of their levies could be imposed on reservations with attendant burdens upon Indians.

---

15. As for example was the case with regard to contractors to the Atomic Energy Commission. *Carson v. Roane-Anderson Co.,* 342 U.S. 232 (1952). (Indeed 25 U.S.C. 465 and 478b may create a parallel statutory immunity applicable here. See *United States v. Rickert,* 188 U.S. 432 (1903); Cf. *United States v. Mitchell,* 100 S. Ct. 1349 (1980).

---

16. Congress on occasion has expressly authorized State taxes on reservation production or activities. See, e.g., 25 U.S.C. 398, 398c, and 399. Congress can thus be presumed to know how to authorize States to levy such imposts when it wishes to do so.

Most importantly, because of the unique legal status of Indian tribes, the States' proposal to have this Court extend the test to apply to State-Indian tax clashes would deprive Congress of its historic policy-making function with regard to Indian matters. It would alter rules vital to continued tribal existence which have both explicit and implicit support from Congress. Reversal of these rules is the prerogative of Congress, not of this Court. U.S. Const., Art. I, §8, cl. 3.

Under these rules, the decision below was clearly in error. The New Mexico Court of Appeals rested its decision in favor of upholding this levy on the same grounds that the Arizona Supreme Court had in *Warren Trading Post Co.*[17] That rationale was decisively rejected by this Court in both *Warren* in 1965 and *Central Machinery* fifteen years later. See *Central Machinery,* 448 U.S., at 164, n. 3. New Mexico's tax has burdened Navajo self-government and a specific congressional purpose by depleting resources furnished by Congress to construct a reservation school for Navajo children. The tax thus conflicts with the New Mexico Enabling Act, 36 Stat. 558-559; N.M. Const., Art XXI, §2,[18] the Navajo Treaty, the Indian Self-Determination Act, the Indian Trader Statutes, and the specific construction appropriations made by Congress directly to this remote Navajo community school board.

---

17. *Warren Trading Post Co. v. Moore,* 95 Ariz. 110, 387 P. 2d 809 (Ariz. 1963).

---

18. Disclaimer clauses in State enabling acts similar to New Mexico's have recently been held to bar State jurisdiction over adjudication of tribal water rights. *Northern Cheyenne Tribe v. Adsit,* 668 F. 2d 1080 (9th Cir. 1982); *San Carlos Apache Tribe v. Arizona,* 668 F. 2d 1093 (9th Cir. 1982); and *Navajo Nation v. United States,* 668 F. 2d 1100 (9th Cir. 1982).

In short, the opinion below has ignored the uniform precedents of this Court and must be reversed.

CONCLUSION

For the foregoing reasons, Appellants pray for an order reversing the decision below and remanding with instructions that the court below enter judgment for Appellants with explicit directions that the Appellee Bureau of Revenue be ordered to refund, with interest from date of assessment, the taxes which have been illegally collected, and for such other and further relief as the Court deems appropriate.

Respectfully Submitted:

MICHAEL P. GROSS
Carl Bryant Rogers
Roth, VanAmberg and Gross
P.O. Box 1447
Sena Plaza
Santa Fe, New Mexico 87501
(505) 988 8979

Counsel for Appellants,
Ramah Navajo School Board, Inc.
and Lembke Construction Co., Inc.

Of Counsel:
Neal A. Jackson
April 1982.

APPENDIX A

Excerpt from "A Checklist of New Mexico State & Local Taxes, Permits & Licenses", Undated, Tax Research and Statistics Office Taxation and Revenue Department, P.O. Box 630, Santa Fe, New Mexico 87509.

Collected by: Revenue Division
Taxation & Revenue Department

* * * *

GROSS RECEIPTS TAX—An excise tax of 3.5% of gross receipts is imposed for the privilege of doing business in New Mexico. The tax is broadly based and is imposed on services as well as sales and leases of tangible personal property. Various deductions are authorized; some activities and industries are exempt, part of these by virtue of their taxation under other laws. Exemptions include wages, certain agricultural products, dividends and interest, and gas, oil and mineral extractions. Although this tax is imposed on the seller (unlike a sales tax which is imposed on the buyer), it is customary to pass such tax on to the buyer making it a general sales tax in effect. The gross receipts tax was reduced from 3.75% to 3.5% by the 1981 Legislature.

Collected by: Revenue Division
Taxation & Revenue Department

* * * *